No. 15,611

United States Court of Appeals

For the Ninth Circuit

HARRY L. MARSHALL, JR.,
Appellant,

vs.

WESTFAL-LARSEN & CO.,
Appellee.

APPELLANT'S CLOSING BRIEF.

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APPELLANT'S CLOSING BRIEF.

I. MARSHALL HAS NEVER CONTENDED THAT RESPONDENT WAS AN INSURER.

Respondent states that Marshall's brief is "premised on the proposition that appellee is an insurer of appellant's safety" (RB 3)[1] and that in his brief Marshall has taken "the untenable position that the mere happening of an accident to a passenger is sufficient to enforce a liability upon the carrier." (RB 8, 19.)

These statements are entirely incorrect. At no point in this litigation has Marshall taken the position that respondent was an insurer. (See pages 6-11 of our opening brief.)

[1]We shall cite respondent's brief in this way, that is, by the letters "RB"; and we shall cite Marshall's opening brief by the letters "MB".

II. THE OLD ADMIRALTY RULE THAT THERE SHOULD BE A TRIAL DE NOVO ON APPEAL NO LONGER GOVERNS, BUT RULE 52(a) APPLIES TO ADMIRALTY CASES AS IT DOES TO OTHERS.

On page 29 of our opening brief we stated that under the Admiralty doctrine of a trial *de novo* on appeal, the appellate court would accept the findings of the trial court as correct unless such findings were clearly "against the weight or preponderance of the evidence."

Respondent is correct in saying that under the recent case of *McAllister v. United States,* 348 U.S. 19, 75 S. Ct. 6, this old admiralty rule is no longer the law. In that case the Supreme Court held that no greater scope of review can be exercised by the courts of appeal in admiralty cases tried without a jury than in other cases; and that Rule 52(a) should be applied in such cases.

Since it is important to bear in mind in this case the standards which should be applied in determining whether a finding is "clearly erroneous" within the meaning of Rule 52(a), let us quote the well-known interpretation of the rule stated by the Supreme Court in the *Gypsum* case (*United States v. United States Gypsum Co.,* 333 U.S. 364, 365, 68 S. Ct. 525). In that case, the court stated that Rule 52(a) was intended, in all actions tried by the court without a jury, "to make applicable the then prevailing equity practice"; and it then went on to say:

> ". . . The practice in equity prior to the present Rules of Civil Procedure was that the findings

> of the trial court, when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the appellate court. The findings were never conclusive, however. *A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'"*[2]

The Court of Appeals of this circuit, of course, has followed this interpretation of Rule 52(a). See *Gillette's Estate v. Commissioner,* 9 Cir., 182 F.2d 1010, 1014; and *Pacific Portland Cement Co. v. Food Machinery and Chemical Corporation,* 9 Cir., 178 F. 2d 541, 548.

In the latter case, this court, after quoting the rule of the *Gypsum* case, said:

> *"As a corollary to the rule, we may make our own inferences from undisputed facts* or purely documentary evidence. For, to use the colorful language of the Court of Appeals for the Third Circuit, the rule does not operate 'to entrench with like finality the inferences or conclusions drawn by the trial court from its fact findings.' *Kuhn v. Princess Lida of Thurn & Taxis,* 3 Cir., 1941, 119 F.2d 704, 705."

In the *Kuhn* case, the Court of Appeals of the Third Circuit, after making the "colorful" statement just quoted, went on to say:

> *"The sufficiency of the evidence to sustain a trial court's conclusion or finding of an ultimate*

[2]All italics in this brief will be ours unless otherwise indicated.

> *fact remains appropriate matter for an appellate court's consideration.* . . . Where the evidentiary facts are not in conflict or dispute, the conclusions to be drawn therefrom are for the appellate court upon review of the trial court's action. . . . An incorrect conclusion by a trial court qualifies as a 'clearly erroneous' finding, for the correction whereof on appeal Rule 52(a) specifically provides."

Marshall contends that the conclusions of the trial court in the case at bar that the respondent did not fail to furnish Marshall with a safe means of disembarking and did not fail to provide men to safeguard and superintend his disembarking were inferences and conclusions drawn by the trial court from its own findings and the undisputed evidentiary facts; that these conclusions remain "appropriate matter" for this court's decision; and that this court should find them "clearly erroneous" because they are not only not supported by substantial evidence, but are directly contrary to the uncontradicted evidence.

III. THE TWO BASIC ISSUES PRESENTED BY THIS APPEAL; IT IS ESSENTIAL TO THE PROPER DISPOSITION OF THE CASE THAT THEY BE KEPT DISTINCT.

These two issues are as follows: First, is the conclusion of the trial court, that respondent did not fail to exercise the high degree of care it owed Marshall, supported by the court's findings of the specific facts and substantial evidence; in other words, is it

clearly erroneous; and secondly, was Marshall himself negligent?

Respondent does not challenge Marshall's contention (MB 49-50) that the admiralty doctrine of comparative negligence should be applied to this case; it merely says that the doctrine is not applicable because the trial court's finding that Marshall's injuries were due solely to his own negligence is supported by the evidence (RB 19-20).

But if the findings of specific facts and the evidence show that respondent failed to exercise the high degree of care it owed Marshall, Marshall under the doctrine is entitled to recover even if he himself was negligent.

It is essential, therefore, to the proper disposition of this appeal that these two crucial issues be kept distinct.

IV. THE FACTS SPECIFICALLY FOUND BY THE COURT AND THE EVIDENCE SHOW WITHOUT CONTRADICTION THAT RESPONDENT VIOLATED THE HIGH DUTY OF CARE IT OWED MARSHALL.

1. There is an obvious and glaring contradiction in respondent's entire argument.

In the first place, respondent argues in effect that the means furnished by it to Marshall to enable him to disembark were so safe that it was not necessary for it to provide competent men to assist him in disembarking; and in the second place, it argues that Marshall in using the means so furnished him, in the face of Nelson's warning, was negligent.

The two contentions are simply irreconcilable. If the means of disembarking were safe; if the barge was a stable platform; if Marshall had been obliged, not to jump but only to step off, then obviously there would have been absolutely no reason for Nelson to call to Marshall not to jump and there could have been no negligence on Marshall's part.

But Nelson did call to Marshall not to jump. Why? Obviously because Nelson saw that it was not safe for Marshall to jump. If Nelson, an ordinary seaman, engaged in scraping and painting the ship and charged with no duty with regard to Marshall, knew this, certainly the captain must have known it; and it was the duty of the captain "to protect" Marshall "from harm with the care, skill and prudence which an 'exceedingly competent and cautious man would bring to the task in like circumstances.' "

And why did the trial court find that Marshall was negligent in making the jump? Because the court believed that, in the face of Nelson's warning, he had used an unsafe way of getting off the ship.

The fact that Nelson did call to Marshall not to jump; the fact that the court found Marshall negligent; these facts in themselves demonstrate that the respondent did not furnish Marshall a safe means of getting off the ship, that it failed to exercise the high degree of care the law imposed upon it.

2. Respondent did not take any steps to safeguard Marshall when he made his jump.

As Marshall pointed out in his opening brief (pp. 17-18, 23-24), the court's findings of specific facts and the uncontradicted evidence show that the captain did not get down onto the barge to assist Marshall in descending; that neither the captain nor Kaldefoss ordered Nelson and Nordfonn to so assist Marshall; that respondent did fail to provide officers and employees to superintend Marshall's disembarking; and that it did fail to take any means whatever to safeguard Marshall while he was disembarking. The captain simply let Marshall take his jump without any assistance of any kind.

Respondent cannot and does not challenge what we have just said. In failing to make such a challenge, in trying to ignore and gloss over the fact that the captain let Marshall, in effect tacitly directed Marshall, to take his jump without help, respondent, we maintain, is in effect conceding that it failed utterly to provide men to superintend and safeguard Marshall's disembarking, and that, therefore, it failed to perform the duty it owed him.

The only finding that the trial court made with respect to what we have been discussing is that "Assistance was available to libelant in reaching the barge, if he wished it." But as Marshall pointed out on pages 18-19 of his brief, the question is not what Marshall wished, but whether respondent performed its duty of safeguarding him when he made his jump, which proved to be dangerous, by providing compe-

tent men to assist him in getting onto the barge. And respondent, as we have said, does not and cannot challenge our statement that it failed utterly to do these things.

3. Respondent did not furnish Marshall with a safe means of disembarking.

Respondent says that at other ports at which passengers from the vessel disembarked, they moved from the lower platform of the gangway to a small shore boat which would "bob around" and was not as stable as the barge. But respondent fails to mention that when passengers got into such a boat, there would be an officer, or a seaman, on the lower platform to assist the passengers into the boat and that the man in charge of the boat would be there to take hold of a passenger as he left the lower platform and help him into the boat (R 54-55).

The trial court found that there was a swell to the sea which moved the barge *up and down under the gangway from two to three feet;* that Marshall *"jumped"* from the gangway platform to the barge while "it" was rising on a swell and before it had reached its crest; and that when Marashall landed on the barge he was *"pitched"* by its movement to his left; and that he, "in order to avoid being thrown down the forward hold of the barge turned sharply "twisting and injuring his knee" (R 14-15).

The court did not find how far the lower platform was above the deck when Marshall jumped, but it did not find that he stepped off the platform to the

barge. On the contrary, it found that he "*jumped,*" which certainly implies that there was a substantial distance from the platform to the barge, such a distance as would require a jump.

Despite these findings of the trial court, respondent in its brief tries to give the impression that Marshall was not obliged to jump; that really all that he was required to do was to step off the gangway's platform to the deck of the barge. It says that the lower platform of the gangway was "*slightly* above the deck of the barge when it was at the crest of the swell" (RB 9); and it refers to Nordfonn's testimony that the barge was still rising on the swell when Marshall jumped and that at that time the lower platform was about one-half a meter (19-20 inches) above the deck of the barge (RB 9-10).

Respondent says that Nordfonn was "in an excellent position to judge the distance between the lower platform and the barge" (RB 9-10).

Nordfonn testified that he was "on the afterend of the barge," a little aft of K4 on Kaldefoss' rough drawing (ND 3-4); in other words he testified in effect that he was about sixty-five to seventy-five feet from the gangway's lower platform. (See page 36 of our opening brief for a more complete discussion of Nordfonn's testimony in this regard.) Kaldefoss placed Nordfonn at about the same place (MB 35-36). The captain said that Nordfonn was in the after end of the barge and that he believed it was Nordfonn who was pulling on the line that tied the after end of the barge to the ship when Marshall was descend-

ing the stairs. (The captain's testimony in this regard is quoted on pages 38-41 of our opening brief.) Since Nordfonn was at least sixty-five to seventy-five feet from the platform and since, as found by the court, the barge was being moved up and down two to three feet by the swell, he was not in "an excellent position" to judge the distance; he was in a poor position to judge it.

Kaldefoss, on the other hand, was standing at the head of the gangway above the platform. He testified that when, as in this case, a gangway is lowered onto a barge being moved up and down by a swell, it is always maintained rather high off the barge so that the barge cannot be lifted by the swell high enough to strike the gangway, and that when the gangway involved in this case was lowered, it was rigged in accordance with this practice (KD 21). (This testimony of Kaldefoss is quoted on page 23 of our opening brief.) And he then testified that when Marshall descended the gangway, its lower platform was about two to three feet above the deck of the barge (KD 10).

Marshall testified that when he reached the lower platform, it was two or three feet above the deck of the barge (R 43-44).

In the light of this testimony, respondent cannot succeed in its effort to give the court the impression that the platform was only slightly above the deck of the barge when it reached the crest of its swell. If this had been the case, a small increase in the swell would have dashed the heavy steel barge against

the gangway and have seriously damaged it. It was rigged to avoid the possibility of such damage.

As found by the court, Marshall was obliged to jump from the platform to the barge. If Nordfonn was right in his estimate that at the moment Marshall jumped the barge was still rising and the platform was about one-half a meter (19 to 20 inches) over the deck of the barge, that under the circumstances was a substantial jump, a jump which as Nelson saw might expose Marshall to danger and did actually expose him to the grave danger of being thrown down the forward hold. But the fact is that the gangway was necessarily rigged high enough above the barge so that it would not be struck when the barge was lifted by the swell. No one was there with a ruler to measure the distance, and no one can say exactly what point in its rise the swell had reached when Marshall jumped; but he was not able to step off the platform onto the barge; he was obliged to make a substantial jump onto the unstable deck of the barge. As he testified, he did not know what "a swell could do to him," but the captain and Kaldefoss knew. But the captain did not get down onto the barge before Marshall jumped to assist him. Neither he nor Kaldefoss ordered the two men working on the barge to assist him. They did absolutely nothing to protect him. And when he landed on the barge, he was, as the court found, pitched by its movement and was obliged to turn sharply to save himself from being thrown down the forward hold (which might have killed him). In so turning, he suffered

the injuries for which he is seeking in this action to recover.

4. Conclusion with respect to the first issue that respondent failed to furnish Marshall with a safe means of disembarking, and to provide men to superintend and safeguard his disembarking.

This court is free to draw from the specific findings of the trial court and the uncontradicted evidence in the case the ultimate inferences and conclusions which in its opinion the findings and uncontradicted evidence reasonably induce.

The fact that Nelson felt called upon to try to warn Marshall; the fact that the trial court found that Marshall was negligent in using the means furnished him to disembark, in themselves demonstrate that these means were not safe.

Respondent failed entirely to provide men to safeguard Marshall's disembarking.

Marshall was obliged to jump a substantial distance to the deck of the barge, which was being moved up and down two to three feet by the swell. He did not know what a swell could do to him; but he found out; when he landed he was pitched by the swell and was obliged to turn sharply to avoid being thrown down the empty hold.

There cannot be the slightest doubt that respondent failed to exercise the very high degree of care it owed Marshall to furnish him with a safe means of disembarking and to provide competent men to safeguard him when disembarking.

V. THE FINDINGS AND EVIDENCE SHOW THAT MARSHALL WAS NOT GUILTY OF NEGLIGENCE; BUT IF HE WAS, UNDER THE ADMIRALTY DOCTRINE OF COMPARATIVE NEGLIGENCE HE WAS STILL ENTITLED TO RECOVER.

1. As found in effect by the trial court, the captain descended the stairs behind Marshall.

It is true that the captain testified that his recollection was that Marshall jumped when he and Kaldefoss were talking at the head of the gangway; that he was not on his way down the stairs of the gangway at that time; and that he thought Marshall was on his feet when he started down the stairs (SD 15-17).

Marshall testified that the captain followed him down the steps of the gangway (R 43) and that the captain was two or three steps up the gangway when he jumped (R 68).

Nordfonn testified that he saw Marshall for the first time when he was standing on the lower platform of the gangway; that at that time the captain was on the stairs descending from the upper platform "directly behind" Marshall, "possibly a couple of meters away."

In its brief respondent refers to the testimony of the captain which we have just mentioned, that is, the captain's testimony that when Marshall jumped, he was still on the upper platform at the head of the gangway talking to Kaldefoss; and then respondent in the next sentence says:

> ". . . Thus the captain was behind Marshall as he descended the gangway and as the court found, but at a considerably greater distance than

> the two or three steps claimed by Marshall" (RB 11).

This is just an attempt to reconcile the captain's testimony with what the court actually found concerning the point. The attempt was entirely unsuccessful. The court did not find that the captain was at the head of the gangway talking to Kaldefoss when Marshall jumped; but it found that "As libelant descended the gangway the captain was behind him." This is not, to be sure, a finding that the captain was two or three steps up the gangway from Marshall when Marshall jumped; but when the words are read in context and are given their ordinary meaning, they can mean only one thing; and that is, that the captain descended the stairs behind Marshall.

Both Marshall and Nordfonn testified that the captain was only a few stairs behind Marshall when the latter jumped. But it makes no difference how far up the stairs he was from Marshall; and indeed it would make no difference if the captain had been at the head of the gangway talking to Kaldefoss when Marshall jumped. The captain testified that when he was talking with Kaldefoss at the head of the gangway, Marshall came on deck and walked by him and Kaldefoss down the stairs (SD 14). Whether the captain stayed there or went down the stairs behind Marshall, he, of course, knew that Marshall was descending the stairs to jump onto the barge; and he, being a seafaring man, knew that the moving barge could pitch Marshall when he jumped; and he knew, or should have known, that such a pitch

might throw Marshall down the empty hold and seriously injure, if not kill, him; and he did absolutely nothing to protect him. He did not tell Marshall to wait until he had gotten onto the barge so that he could assist Marshall. He did not order Nelson and Nordfonn to assist Marshall. He tacitly directed him to make the jump. He flagrantly violated the high duty of care which he, as master of the vessel, owed Marshall.

2. Marshall did not deny that Nelson and Nordfonn were on the barge when he jumped.

Respondent repeats in its brief that Marshall denied that Nordfonn and Nelson were on the barge and that his denial of this fact justified the trial court in disbelieving his testimony (RB 11-12, 14). Marshall did not deny that there were men on the barge; he testified that he did not see any men on the barge and did not hear Nelson call to him (R 68-70). (Marshall's testimony in this regard is quoted on pages 30-31 of our opening brief.) Nordfonn and Kaldefoss and the captain had all testified in their depositions that Nelson and Nordfonn were on the barge. At the trial, Marshall did not contradict them; there could be no question that the men were on the barge; all that Marshall said, as just stated, was that he did not see them or hear Nelson.

Marshall's testimony was corroborated in every respect by some or all of respondent's own witnesses, except with respect to this one fact, whether he saw and heard Nelson. He is a truthful and honest man, and there was no basis for rejecting his testimony.

3. When the "entire evidence" bearing on the point is considered, it is clear that the trial court's finding that Marshall ignored Nelson's warning is not supported by the evidence.

Whether this finding is or is not supported by the evidence depends on Nelson's position on the barge when Marshall jumped.

In our opening brief we discussed at some length the testimony bearing on the point (MB 32-45). We do not intend to repeat here what we said there; but we would like to call to the court's attention the summing up on pages 42-43 of our brief of the sharp and material contradictions respecting the point in the testimony of respondent's witnesses.

All that we should do here is to consider certain of respondent's comments with respect to the point.

Nelson, it will be recalled, testified that when Marshall was on the lower platform, he was painting and scraping the ship about twenty feet from the lower platform and that Nordfonn was within a meter or a half a meter from him (R 81-82, 95). (See pages 33-34 of our opening brief for a more detailed statement of his testimony.)

In its brief, respondent says that "Nelson's testimony as to his position on the barge was—supported" by the testimony of Kaldefoss and Nordfonn (RB 12-13).

It should be borne in mind that the sketch which Kaldefoss prepared to illustrate his testimony (which is attached to his deposition and referred to in our brief as Exhibit A) did not purport to be drawn to

scale; but quite the contrary. It shows, for example, the gangway much longer in relation to the ship and the barge than it should have been shown; and it does not show correctly the relation of the forward hold on the barge to the lower platform of the gangway.

The marks to which we are about to refer, "K3" and "K4," appear on Kaldefoss' sketch, Exhibit A.

We should first say here that we were mistaken in saying on page 37 of our brief that Nordfonn testified that Nelson was approximately at K5. Nordfonn testified that he was on the after end of the barge (ND3), a little aft of K4 (ND 4), and he then testified:

"Q. Will you point to approximately where Mr. Nelson was located?

A. Right here.

Q. You are pointing to K-3?

A. *I can't say for sure,* but it was somewhere in the vicinity where I put my finger." (ND 4.)

Kaldefoss testified on cross-examination by Marshall's counsel:

"Q. Where were they [Nelson and Nordfonn] in reference to the lower platform when Mr. Marshall got onto the barge?

A. One here, *may be,* and one here (indicating).

Q. Would you mark that?

Mr. Gerhardt. We have got K-1 and K-2. Mark it K-3.

Mr. Erskine. Q. Where the dot is next to the letter and figure K-3, that was where one was?

A. Yes.

Q. Where was the other? Mark that K-4.
A. Here (indicating).
Q. What were they doing on the barge?
A. They were scraping and painting the ship's side."

He did not say which of the men was at each of the places so indicated by him.

The lower platform of the gangway was about opposite the forward coaming of the forward hold. Marshall so testified (R 45); and the court so found (R 14-15). Applying the scale on which Exhibit 1 was drawn (one-eighth of one inch to the foot), the lower platform of the gangway was, therefore, about ten feet from the prow of the barge.

Kaldefoss' mark K-3 was a few feet forward of the middle of the barge, about opposite the forward coaming of its middle hold, and Kaldefoss' dot was alongside and a little forward of K-3. The barge, as Kaldefoss testified, was one hundred feet long. Assuming that Kaldefoss' vague indication of Nelson's position on the barge should be considered at all in determining Nelson's approximate place on the barge, we should say that Kaldefoss placed him about forty to forty-five feet from the prow of the barge, or about thirty to thirty-five feet from the lower platform of the gangway, and assuming that Nordfonn's equally vague indication of Nelson's position should be considered for such purpose, we should say that he placed him at about the same distance from the lower platform as Kaldefoss.

Respondent, therefore, is not correct in saying that Nelson's testimony as to where he and Nordfonn were on the barge is corroborated by Nordfonn and Kaldefoss. Nordfonn and Kaldefoss' testimony in this regard is in conflict with that of Nelson as to where he was and their testimony sharply contradicts Nelson's statement that Nordfonn was right alongside of him, one-half a meter to a meter away.

But under the rule this court in determining where Nelson was should consider "the entire evidence"; and so it is essential that it should have in mind the captain's testimony.

Respondent is incorrect in its statement that the captain "could not locate" the men "accurately" on the barge (RB 14). The captain recalled incidents involving the men which enabled him to place the men in a manner which carries conviction. The captain on his direct examination said that Nelson "was on the after end of the barge" and that Nordfonn was "back there" too (SD 8); and then he, on cross-examination, located them at B on Exhibit A, a point about ten to fifteen feet from the end of the barge; and in doing so he said that "That kind of picture is blurred," but that that was approximately where they were (SD 20).

In this testimony the captain was entirely definite in locating the men at the after end of the barge, but was somewhat uncertain in fixing their exact location.

But he was not at all uncertain in his later cross-examination when he testified that when Marshall was

going down the steps of the gangway one of the men (he believed it was Nordfonn, but was not sure) was "putting his weight on the line," which tied the barge to the ship, "so as to pull the barge in" to the ship, and that he a little later shouted to the men not to pull any more because Marshall was then on the barge and he was worried that as the barge was brought in under the lower platform of the gangway, the gangway might strike Marshall (SD 17-21). (This testimony is quoted at length on pages 38-41 of our opening brief.)

Parenthetically we should say that this testimony of the captain makes it perfectly clear that the lower platform was considerably higher than the barge, because if it were not, there would have been no basis for the anxiety concerning Marshall which the captain felt.

But the point here is that the captain could not have imagined and could not have been mistaken about incidents of this sort. His circumstantial account of what happened must be accepted as true. Since he remembered these incidents so clearly, he must have remembered the position of the men taking part in them. And so his testimony placing them in the after part of the barge should, we submit, be accepted as correct.

It follows that Nelson's testimony, that when Marshall was on the lower platform he was painting and scraping the ship about twenty feet away and that Nordfonn was working about one meter away from

him, cannot be accepted as correct, and that this court should conclude, on the basis of the entire evidence, that both he and Nordfonn were in the after part of the barge.

4. This court should infer that neither the captain nor Kaldefoss heard Nelson's warning.

Neither Kaldefoss nor the captain testified that they heard Nelson call to Marshall.

Marshall claims that since they did not so testify, he has a right to infer that they did not hear Nelson (MB 31).

Respondent says that Marshall does not have the right to draw such an inference (RB 14).

31 C.J.S. 849 states the applicable rule as follows:

> " . . . It has also been held that, where a party fails to present a fact necessary to his case when it is within his power to do so, it will be presumed that such fact does not exist."

In *Interstate Circuit v. United States,* 306 U.S. 208, 226, 59 S. Ct. 467, 474, the court said:

> " . . . The production of weak evidence when strong is available can only lead to the conclusion that the strong would have been adverse [citing cases]. Silence then becomes evidence of the most convincing character [citing cases]."

In *Halpine v. Halpine,* 138 Conn. 578, 87 A.2d 146, the plaintiff called defendant as a witness and proved by her certain incidental facts, but did not examine her with respect to the crucial issues. When the time came for defendant to prove her case, she did not take

the stand to testify with respect to such issues. The trial court charged that no unfavorable inference should be drawn from her failure to do so. The upper court, in setting aside the judgment for defendant, said:

> " . . . If counsel for the defendant had reason to believe that her testimony would strengthen her case, there was no reason why she should not have been called by them. As she was not called, there is no injustice in permitting an inference that, if called, her testimony would have favored the plaintiff."

Since it would have strengthened respondent's case if the captain and Kaldefoss had testified that they heard Nelson, it must be inferred from their silence that they did not hear him. Since the captain and Kaldefoss did not hear Nelson, why should Marshall have heard him?

Respondent also says that since Kaldefoss and the captain were at the head of the gangway in conversation, there was no reason why they should have heard Nelson (RB 14-15). But, as we have pointed out, the trial court found in effect that the captain descended the stairs behind Marshall, and as we have also pointed out, Nordfonn testified that the captain was directly behind Marshall, "possibly a couple of meters away," and Marshall testified to the same effect. If Nelson had been only twenty feet from the lower platform when he called, the captain would most certainly have heard him. In fact, he would have heard him under such circumstances if he had been at the top of the gangway.

5. Assuming Marshall heard Nelson, still he was not negligent in using the means of disembarkation furnished him and in following the captain's tacit direction to jump.

In the first place, as illustrated by the *Burrows, Mawson* and *The Ocracoke* cases (see pp. 8-10 of our opening brief for a review of these cases), when a passenger is furnished a means of disembarking, he is not under any duty to order other or better means, or to order assistance in their use, but the obligation to furnish safe means and assistance rests on the vessel. It cannot be the law that a vessel may furnish a passenger with an unsafe means of disembarking and then maintain that his use of it was negligent.

If Marshall heard Nelson's warning, he was in this predicament: The master of the ship was going off the ship with him and was behind him, and was tacitly directing him to use the means of disembarking which had been furnished him, and to make the jump; whereas Nelson, a sailor engaged in work on the barge, was telling him not to jump. Marshall, not knowing what a pitch of the barge would do to him, followed the captain's tacit direction to use the means of disembarking which had been furnished him. He cannot be charged with negligence in so doing.

Respondent tries to meet this argument by saying in effect that a vessel's duties to its passengers are performed by the entire ship's company and not just by the captain, "and that consequently Marshall had no right to follow the captain's directions, but that he should have obeyed Nelson's warning" (RB 16-17).

The point is specious and ignores the essential facts.

Marshall testified that he stood on the gangway's lower platform a few seconds; that the distance to the deck of the barge seemed "a safe distance"; and that he jumped, not knowing "what a swell could do to" him (R 68, 71). (This testimony is quoted in full at pages 25-26 of our opening brief.)

Assuming Marshall heard Nelson's call, he may have heard it just when he was in the act of jumping and so could not have stopped his act.

Whether or not this was so, in our situation the captain was under both a general and special duty with respect to Marshall. As stated in *Voltmann v. United Fruit Co.*, 2 Cir., 147 F.2d 514 (cited on page 7 of our opening brief), a master of a vessel is under a duty "to protect" each of his passengers "from harm with the care, skill and prudence which an exceedingly competent and cautious man would bring to the task in like circumstances."

In our situation, the captain owed Marshall not only this general duty, but a special duty as well, because he and Marshall were going ashore together and he was behind Marshall on the gangway. And so he, as the master, was in direct charge of furnishing Marshall the means of disembarking being used and to superintend and safeguard him in its use; whereas Nelson, a seaman who was engaged in scraping and painting the ship, was not charged with any duty with respect to Marshall.

Under these circumstances, Marshall most certainly had the right to assume that the captain, to quote re-

spondent, would "serve his needs"; and he had the right to follow the captain's tacit instructions; and he cannot be held negligent in doing so, even if he had heard Nelson.

But even if it be assumed that Marshall was negligent because he heard and ignored Nelson's warning, still the fact that he was negligent certainly did not exonerate respondent from the obligation it owed Marshall to exercise the highest degree of care to furnish him with a safe means of getting off the ship and in providing men to assist him.

Respondent cites *Erdman v. United States,* 2 Cir., 143 F.2d 198, in support of its argument that when Nelson called to Marshall, it had performed all the duty it owed him.

But there is no analogy between the *Erdman* case and the case at bar. In that case, the libelant, a passenger, was injured in using a swimming tank despite the fact that he was warned by ropes stretched across the entrance to it (a warning that he understood), that under the circumstances it was dangerous to use the tank and that he was forbidden to use it. The trial court held that both sides were negligent and divided the damages. The majority of the Court of Appeals reversed the trial court, holding that the vessel had fulfilled its duty to the libelant in thus forbidding him to use the tank and that therefore he was not entitled to recover.

Judge Learned Hand dissented upon the ground that the court in the state of the record before it was

Marshall testified that he stood on the gangway's lower platform a few seconds; that the distance to the deck of the barge seemed "a safe distance"; and that he jumped, not knowing "what a swell could do to" him (R 68, 71). (This testimony is quoted in full at pages 25-26 of our opening brief.)

Assuming Marshall heard Nelson's call, he may have heard it just when he was in the act of jumping and so could not have stopped his act.

Whether or not this was so, in our situation the captain was under both a general and special duty with respect to Marshall. As stated in *Voltmann v. United Fruit Co.*, 2 Cir., 147 F.2d 514 (cited on page 7 of our opening brief), a master of a vessel is under a duty "to protect" each of his passengers "from harm with the care, skill and prudence which an exceedingly competent and cautious man would bring to the task in like circumstances."

In our situation, the captain owed Marshall not only this general duty, but a special duty as well, because he and Marshall were going ashore together and he was behind Marshall on the gangway. And so he, as the master, was in direct charge of furnishing Marshall the means of disembarking being used and to superintend and safeguard him in its use; whereas Nelson, a seaman who was engaged in scraping and painting the ship, was not charged with any duty with respect to Marshall.

Under these circumstances, Marshall most certainly had the right to assume that the captain, to quote re-

spondent, would "serve his needs"; and he had the right to follow the captain's tacit instructions; and he cannot be held negligent in doing so, even if he had heard Nelson.

But even if it be assumed that Marshall was negligent because he heard and ignored Nelson's warning, still the fact that he was negligent certainly did not exonerate respondent from the obligation it owed Marshall to exercise the highest degree of care to furnish him with a safe means of getting off the ship and in providing men to assist him.

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Judge Learned Hand dissented upon the ground that the court in the state of the record before it was

obliged to assume that a steward, who was at hand to attend to the wants of the passengers who were lying or sitting about, did not warn the libelant not to go into the pool, and that consequently there "was a failure in that extreme care which the law exacts of a carrier of passengers."

The distinction between this case and the case at bar is simple and obvious. In the *Erdman* case, the passenger had been forbidden to use the tank in its dangerous condition, whereas in the case at bar Marshall had not been forbidden to use the means of disembarking which he did use; on the contrary, it was the only means of getting off the ship and he used it under the direct supervision and at the direction of the captain.

In the *Erdman* case, the majority held that the vessel had fully performed its duty in forbidding the passengers to use the tank; whereas, in the case at bar, respondent certainly did not perform the duty it owed Marshall to furnish him with a safe means of disembarking and to provide men to safeguard its use.

And so in the case at bar the respondent was negligent, even if it be held that Marshall heard and ignored Nelson's call and was therefore negligent (which, of course, we deny).

VI. CONCLUSION.

The cases cited by respondent are briefly reviewed in the appendix to this brief. Each of them is very different from the case at bar. In each of them the vessel had not failed to exercise the high degree of care it owed its passenger and the latter's injury was due solely to his own negligence.

Each case of this sort must be decided on its own facts and on the principles established by the law. There can be no doubt with respect to the principles which should be applied in deciding this case. The rule is that a passenger is "entitled to have a carrier exercise for his safety as much skill, care and prudence as an exceedingly competent and cautious man would bring to the task in like circumstances"; and the rule also is that a carrier, in the performance of this duty, is required to furnish passengers with a safe means of disembarking and to provide competent men to render such services as are necessary to get passengers safely ashore.

Neither can there be any doubt, in view of the trial court's findings and the uncontradicted evidence, that respondent's failure to perform these duties caused Marshall's injury and might have caused him much more severe injury than those he suffered or even his death.

Marshall himself was not negligent; but if it be held that he was, still under the admiralty doctrine of comparative negligence, he was nevertheless entitled to recover.

We respectfully submit that, as stated in our opening brief, this court should reverse the judgment with directions to the lower court to determine the amount of Marshall's damages and to enter judgment for him for that amount.

Dated, San Francisco, California,
February 19, 1958.

Respectfully submitted,
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ERSKINE, ERSKINE & TULLEY,
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(Appendix Follows.)

Appendix.

Appendix

A BRIEF CONSIDERATION OF RESPONDENT'S CASES.

In *The Empress of Scotland* (D.C. S.D. N.Y.), 11 F.2d 783, the vessel had stationed its chief officer at the bottom of the gangway to assist passengers onto the tender and it placed two seamen on the tender to assist passengers boarding it. The trial court held that the vessel had provided sufficient men to render any necessary assistance that might be required by its passengers and that, therefore, the libelant's injuries were not due to any negligence on its part.

In *The Vulcania* (D.C. Mass.), 8 F. Supp. 300, a steward had been placed in a motor boat to assist passengers from a life boat to the motor boat and from the latter boat to the dock. When the steward's back was momentarily turned, plaintiff attempted to move from the life boat to the motor boat without waiting for aid from the steward and was injured.

In *Goode v. Oceanic Steam Navigation Co.,* 2 Cir., 251 F. 556, the life boat into which plaintiff was stepping was practically motionless and it was necessary for plaintiff to step down only six inches. Two men were stationed in the boat to assist passengers and one of them in fact assisted plaintiff and exercised what was held to be due care in doing so.

In *Weill v. Compagnie Generale Transatlantique,* 2 Cir., 113 F.2d 721, the passenger tripped "on the end of a tarpaulin spread *smoothly* (italics ours) on

the deck." There was no negligence on the part of the vessel and the passenger was obviously not watching his step.

In *Plant Investment Co. v. Cooke,* 2 Cir., 85 F. 611, plaintiff was walking on defendant's dock for the purpose of boarding the ship. Plaintiff had two ways of reaching the ship; one, which had been provided by defendant, was over a cleated gangplank which was safe, and the other was over an incline which was slippery and unsafe. She, with knowledge of the danger, chose the latter and was injured.

In *Fetan v. Atlantic and Caribbean Steam Nav. Co.* (D.C.E. N.Y.), 60 F.2d 328, the plaintiff, who was late in returning to the ship, hired a private motor boat, not in charge of any employee of the vessel, to return him to it.

The court found that he, without the knowledge of any officer or seaman of the vessel, attempted to climb a ladder to its deck while it was moving.

In re Keansburg Steamboat Co., 2 Cir., 249 F. 472, plaintiff walked into a narrow dangerous passageway on the ship where she tripped over some rope. Plaintiff had been repeatedly warned by the mate not to enter the passageway.